U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass. 3/F
Washington, D.C. 20536

[redacted]

APR 18 2003

File: WAC 01 293 57401 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a limited liability company organized in the State of Hawaii in April 2000. It is engaged in the import and retail of sportswear and accessories. It seeks to employ the beneficiary as its director. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established a qualifying relationship with the beneficiary's overseas employer.

On appeal, counsel for the petitioner asserts that the overseas entity owns 50 percent of the petitioner.

Section 203(b) of the Act states, in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the

United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's overseas employer.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

> *Affiliate* means:
>
> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
>
> (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.
>
> *Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.
>
> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

To qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity.

The petitioner's Articles of Organization For a Limited Liability Company, filed April 28, 2000, indicated that it had two initial members.[1] Both members were individuals. The petitioner's operating agreement signed in July 2000 identified its two members as an individual holding 70.7 percent interest and the beneficiary's overseas employer holding 29.3 percent interest. The

[1] The Articles of Organization named two members but indicated that the number of initial members was four. The petitioner subsequently indicated that this was a typographical error on the part of the organizer and that the number of initial members was two.

petitioner's operating agreement defined "contribution" at Article I, Section 1.02(j) in pertinent part as:

> "Contribution" means anything of value that a Member contributes to the Company as a prerequisite for or in connection with membership, including any combination of cash, property, services rendered, a promissory note or any other obligation to contribute cash or property or render services.

The petitioner's operating agreement defined "Membership Interest" at Article I, Section 1.02(p) in pertinent part as:

> "Membership Interest" means a Member's percentage interest in the Company, consisting of the Member's right to share in Profits, receive Distributions, participate in the Company's governance, approve the Company's acts, participate in the designation and removal of a Manager and receive information pertaining to the Company's affairs.

The petitioner's operating agreement in Article 3, Section 3.02 stated that "[w]ithin 10 days after receipt of a Member's written request, the Company will provide the Member with a statement of the Member's Membership Interest."

In response to the director's request for additional evidence on this issue, the petitioner submitted evidence of a wire transfer dated May 15, 2000 from an individual to the petitioner in the amount of $530,000. The petitioner also submitted evidence of a second wire transfer dated March 6, 2001 from the beneficiary's overseas employer to the petitioner in the amount of $250,000. The petitioner further submitted a document dated March 21, 2001 indicating the beneficiary's overseas employer held a 47 percent interest in the petitioner. The petitioner also submitted a statement from the petitioner's accountant dated July 12, 2001 indicating that an individual owned 50 percent of the petitioner and the beneficiary's overseas employer owned 50 percent of the petitioner. The petitioner's accountant submitted a separate statement indicating that the beneficiary's overseas employer had invested $220,100 in the petitioner on June 9, 2000.

The petitioner's Internal Revenue Service (IRS) Form 1065, Return of Partnership Income for the year 2001 confirmed the capital contributions of the two members as of the end of the year as $472,616 for the individual member and $412,799 for the beneficiary's overseas employer.

The director determined that the petitioner had not established that the beneficiary's overseas employer owned and controlled a 50 percent interest in the petitioner. The director, relying on Article I, Section 1.02(p) of the petitioner's operating agreement, found that the beneficiary's overseas employer held only a 47

percent membership interest in the petitioner, and thus, had not established its ownership and control of the petitioner.

On appeal, counsel for the petitioner asserts that a capital contribution is not the only means of determining the member's percentage of ownership. Counsel asserts that the two members of the petitioner agreed to be "50-50 owners when [sic] in fact either party could argue for majority ownership." Counsel also submits a document identified as a resolution of the petitioner stating that the two members agree that each is a 50 percent owner of the petitioner. The document is signed by an individual purporting to be the "manager" of the petitioner. Counsel asserts that the petitioner has submitted sufficient evidence to demonstrate the beneficiary's overseas employer owns and controls 50 percent of the petitioner.

Counsel's assertion is not persuasive. The AAO agrees that the petitioner's operating agreement acknowledges that a membership interest is not limited to the member's capital contribution. However, the petitioner has not provided documents that adequately verify the beneficiary's overseas employer's interest. First, the petitioner has not provided evidence of the beneficiary's overseas employer's capital contribution allegedly made on June 9, 2000. Second, the petitioner's "manager" signed the document submitted on appeal. There is no evidence in the record indicating that this individual is authorized by the petitioner to sign documents on its behalf. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); *see generally Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Without further documentation of this individual's authority or the signed consent of both members of the organization setting out the membership interests, the petitioner has not overcome the director's determination on this issue.

Beyond the decision of the director, the petitioner has provided a broad description of the beneficiary's proposed duties for the petitioner. The record does not contain a comprehensive description of the beneficiary's daily duties. It cannot be determined from the descriptions provided whether the beneficiary will be performing executive duties for the petitioner or will be actually performing necessary operational tasks for the petitioner. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). As the petition will be dismissed for the above stated reason, this issue will not be examined further.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.